THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE

ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No.: 12-ALJ-22-0439-AP

Marcus Wider,

Respondent,

v.

South Carolina Department of Employment
And Workforce and K B Enterprises, Inc,

Defendants,

Of whom South Carolina Department of
Employment and Workforce is

Appellant.

FINAL REPLY BRIEF OF APPELLANT

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I. THE ISSUE OF THE ADMINISTRATIVE LAW COURT'S FAILURE TO REMAND IS PRESERVED FOR APPEAL

In his Brief, Respondent asserts the issue of remand is not preserved for review by this Court as it was not timely raised as an issue before the Administrative Law Court ("ALC"). This assertion is not supported by relevant authority and should therefore be rejected.

Appellant, in its Motion for Rehearing ("Motion"), set out "with particularity" the standard of review which the ALC "overlooked or misapprehended." Rule 221, SCACR. Specifically, the Motion directed the ALC's attention to its failure to apply the proper standard of review mandated by the Administrative Procedures Act (S.C. Code Ann. §§ 1-23-310 *et seq.*) ("APA"). The ALC "may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact" and may only reverse the Panel's decision "if such decision is affected by errors of law...or clearly erroneous in view of the substantial evidence on the whole record." S.C. Code Ann. § 1-23-380(5); Todd's Ice Cream, Inc. v. S. Carolina Employment Sec. Comm'n, 281 S.C. 254, 315 S.E.2d 373 (Ct. App. 1984).

As a general rule, "a party may not raise an issue for the first time in a [motion] for rehearing." Herron v. Century BMW, 395 S.C. 461, 469, 719 S.E.2d 640, 644 (2011). Additionally, "to preserve an issue for appellate review, an appellant must object at his first opportunity." State v. Sullivan, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993). While it is true Appellant did not raise this issue for remand in its brief to the ALC, it did so at Appellant's first opportunity. The Department did not raise the issue of remand in its brief because Appellant "had the right to rely on the presumption of regularity" in the ALC's application of the APA's standard of review and "could have properly assumed the [ALC] would use the proper standard." Anonymous (M-156-90) v. State Bd. of Med. Exam'rs, 323 S.C. 260, 279-80, 473 S.E.2d 870,

880 (Ct.App.1996), rev'd on other grounds, 329 S.C. 371, 496 S.E.2d 17 (1998). Once issued, the ALC's Order (the "Order") "thus presented for the first time a question concerning the standard to be employed." Id. The Department rightly raised in the Motion the question regarding the standard to be used. The ALC ruled upon the issue when it denied Appellant's Motion. Id. (R._) Additionally, the Supreme Court has held the filing of the Motion is not a prerequisite for preserving the issue for this Court's review. In Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E.2d 288 (1962), the Supreme Court reviewed this issue in the context of an appeal from the decision of the Workers' Compensation Commission. The appellant in that case asserted that the lower court erred in ordering a remand because such question was neither raised to the Commission nor was it asserted as a basis of review on appeal to the circuit court. See Id. 241 S.C. at 125, 127 S.E.2d at 293. The Supreme Court in Drake rejected the appellant's argument and held:

> [The issue of remand] is not the raising of a new question on appeal, but the exercise by the court of its inherent power to remand a case, in the interest of justice, to the fact finding body for the purpose of making essential factual findings, so that litigation may be disposed of in accordance with the principles of law governing the decision of factual issues.

Id; see also State Bd. of Med. Examiners v. Gandy, 248 S.C. 300, 306, 149 S.E.2d 644, 646 (1966)("Question concerning the inadequacy of the findings of fact...not raised by any exception in the case...is not conclusive. Where found necessary to a proper review, the case will be remanded on the court's own motion for specific findings of fact.").

Respondent's reliance on MailSource, LLC v. M.A. Bailey & Associates, Inc., 356 S.C. 370, 588 S.E.2d 639 (Ct. App. 2003) is misplaced. Ironically, MailSource contradicts Respondent's assertion and bolsters Appellant's position that the issue of remand is preserved for

review. Under circumstances analogous to the present case, the MailSource Court, relying on Anonymous (M-156-90), supra, held:

> MailSource contends whether it proved prejudice is not properly before this court as Bailey did not raise the issue until the motion for reconsideration. We disagree...Under these circumstances, it is appropriate to request a court to review a ruling which the party contends fails to use the proper standard. Therefore, the issue is preserved for review by this court. [internal citations omitted]

MailSource, LLC, 356 S.C. at 374-75, 588 S.E.2d at 641. Accordingly, the issue of remand is subject to review by this Court.

Pursuant to section 1-23-380(5), the facts of the present case do not authorize the ALC to reverse the Panel's decision. See Responsible Econ. Dev. v. S.C. Dep't of Health & Envtl. Control, 371 S.C. 547, 553, 641 S.E.2d 425, 428 (2007) ("[R]egulatory bodies ... have only the authority granted them by the legislature."); SGM-Moonglo, Inc. v. S. Carolina Dep't of Revenue, 378 S.C. 293, 295, 662 S.E.2d 487, 488 (Ct. App. 2008)(Stands for principle executive branch entities like the ALC have only the powers conferred on them by law and must act within the authority created for that purpose); Bazzle v. Huff, 319 S.C. 443, 445, 462 S.E.2d 273, 274 (1995)("Actions by [ALC] which exceed their statutory authority are null and void."); See, e.g., Smith v. NCCI, Inc., 369 S.C. 236, 631 S.E.2d 268 (Ct. App. 2006)(Under the APA standard of review "when an agency fails to make the proper factual findings required by law, the proper procedure is to remand the case and allow the agency the opportunity to make those findings.") As a result, the ALC failed to apply the proper standard of review and the issue of remand must be reviewed by this Court.

II. THE ADMINISTRATIVE LAW COURT ERRED IN FAILING TO REMAND THE CASE TO THE PANEL AND REPLACED ITS JUDGMENT FOR THAT OF THE PANEL.

The ALC found "The record does not include evidence to support a finding that the [Respondent] caused the damage." (R. p. 2) Furthermore, the ALC found "the Employer failed to provide any competent evidence that the [Respondent] caused any of the damage." Id. The ALC's conclusion was that the evidence in the record would only support a finding in favor of Respondent on the issue of whether he caused the damage. Accordingly, the ALC putatively held that the Panel's decision was an error of law. See Pack v. State Dep't of Transp., 381 S.C. 526, 534, 673 S.E.2d 461, 465 (Ct. App. 2009)("[W]hen the evidence is susceptible of but one reasonable inference, the question becomes a matter of law.")

This was error for two reasons. First, these findings are based on questions of fact and are, therefore, decided solely by the Panel as the ALC has "no authority to determine factual issues but must remand the matter to the [Panel] for further proceedings." Fox v. Newberry Cnty. Mem'l Hosp., 319 S.C. 278, 280, 461 S.E.2d 392, 394 (1995). Second, the ALC clearly focused exclusively on the source from which the conflicting evidence derived rather than its existence in the record as a whole. The record clearly reflects inconsistencies in Respondents testimony, and such evidence shows a dispute in the material facts as to credibility.

It is well established that factual findings on questions of witness credibility lie solely with the Panel. See Milliken & Co. v. S. Carolina Employment Sec. Comm'n, 321 S.C. 349, 350, 468 S.E.2d 638, 639 (1996). A determination of credibility is an essential element of the present case and the Panel "is imbued with broad discretion in determining credibility or believability of witnesses." Small v. Pioneer Mach., Inc., 329 S.C. 448, 465, 494 S.E.2d 835, 843 (Ct. App. 1997) Furthermore, the "[q]uintessential ... operative factor in evaluating credibility of a witness is inconsistency." Id. The ALC's error is made more apparent by its failure to make *any* reference

to this conflicting evidence in its Order despite such evidence being highlighted in Appellant's brief to the ALC. (R. pp. 27-37).

Respondent asserts that Appellant is attempting to "generate inconsistencies in Respondent's testimony where there are none." (Resp Br'f p. 13) However, the record is replete with such evidence and speaks for itself. Because the record contains conflicting evidence on the question of Respondent's involvement in the damage to customer property, it was error for the ALC to reverse rather than remand.

(a) Relevant Case Law Does Not Support Appellant's Assertion the Employer has the Burden of Proof to Establish Discharge for Cause

Respondent argues the ALC was correct in finding "the Department has established that the employer bears the burden of [proof]" and violated the Department's own policies and guidelines by both shifting the burden to Respondent to establish his eligibility for benefits and allowing evidence which was not "sworn testimony ... from witnesses with first-hand knowledge." (Resp. Br'f p. 11.)

Respondent's assertions are unfounded. Our Supreme Court has never explicitly held that an employer has the burden of proving a claimant was discharged for cause. In Nat'l Health Corp. v. S. Carolina Dep't of Health & Envtl. Control, 298 S.C. 373, 379, 380 S.E.2d 841, 844 (Ct. App. 1989), under similar facts, the Court held "[S]ince the [APA] is silent on the ... burden of proof at the agency level contested case hearing, the Department regulations are controlling." Id. Department regulations state that, at the Tribunal level, hearings shall be conducted "in such manner as to ascertain the substantial rights of the parties." S.C. Regs. 47.51.C. Furthermore '[A]ppeals to the Appellate Panel shall be heard solely upon the evidence in the record." S.C. Regs. 47-52.B; see also Anonymous (M-156-90) v. State Bd. Of Med. Examiners, 329 S.C. 371, 375, 496 S.E.2d 17, 19(1998)(Unless the legislature has stated otherwise, "the standard of

[review] in administrative hearings is generally a preponderance of the evidence."). A review of the record establishes the Panel ostensibly based its conclusion on the preponderance of the evidence, rather than on any one party's burden of proof. See, e.g. Leventis v. S. Carolina Dep't of Health & Envtl. Control, 340 S.C. 118, 134, 530 S.E.2d 643, 652 (Ct. App. 2000)(court holding the appellant was not prejudiced as "hearing examiner ostensibly based his recommendation on the preponderance of the evidence, rather than on any one party's burden of proof."); see also Pilgrim v. Eaton, 391 S.C. 38, 703 S.E.2d 241 (Ct. App. 2010)("[the Panel] must make its own findings according to the preponderance of the evidence after a thorough review of the entire record.").

Additionally, our Supreme Court has never explicitly held that an employer has the burden of proving a claimant was discharged for cause. The current authority on the matter is that a claimant has the burden of proving his eligibility for benefits. See Hyman v. S.C. Emp't Sec. Comm'n, 234 S.C. 369, 373, 108 S.E.2d 554, 556 (1959)("Where a claimant files an application for unemployment compensation benefits, the burden is upon such claimant to show that he has met the benefit eligibility conditions.").

Respondent's assertion that first hand testimony should be considered the only competent evidence in the record is misguided. Under the South Carolina Rules of Evidence "all relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina." Rule 402, SCRE. Additionally, S.C. Code Ann. § 1-23-10 states "[P]olicy or guidance issued by an agency other than in a regulation does not have the force or effect of law" and Department policy or guidelines "can never trump a regulation." Doe v. S. Carolina Dep't of Health & Human Servs., 398 S.C. 62, 68, 727 S.E.2d 605, 608 (2011).

See S.C. Regs. 47-51 (mandating that when a party appeals the initial determination of a claims adjudicator, "[t]he [Department's] Appeal Tribunal shall include in the record and consider as evidence all records of the [Department] that are material to the issues."); see also Faile v. S.C. Employment Security Commission, 267 S.C. 536, 230 S.E.2d 219 (1976)("Regulations authorized by the legislature have the force of law.") If authorized by law, the Rules of Evidence allow the admission of any evidence which has a tendency to make any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Rule 401, SCRE; State v. Jarrell, 350 S.C. 90, 104, 564 S.E.2d 362, 370 (Ct. App. 2002).

Appellant asserts that the fact-finding statement is "unsworn, uncertified, and unsubstantiated" evidence upon which "no reasonable person could rely." (Resp. Br'f p. 13.) However, Respondent never objected to the admission of the fact-finding statement, therefore, it is competent evidence upon which the Panel could rely. See State v. White, 215 S.C. 450, 55 S.E.2d 785 (1949)("Evidence even [if] incompetent, if admitted without objection or motion to strike, will be given the same probative force as that to which it would be entitled if it were competent.") Furthermore, "the substantiation (or lack thereof) of [evidence] goes to its weight, not its admissibility." Utilities Servs. of S. Carolina. Inc. v. S. Carolina Office of Regulatory Staff, 392 S.C. 96, 111, 708 S.E.2d 755, 763 n. 13 (2011) The Court has held, "the reliability of documents and Respondent's statements [are] matters of credibility for the [the Panel]." Fishburne v. ATI Sys. Int'l, 384 S.C. 76, 90, 681 S.E.2d 595, 602 (Ct. App. 2009). Accordingly, the evidence is such that could have affected the Panel's view of Respondent's credibility.

(b) Appellant has been Prejudiced by the ALC's Reweighing of the Facts and Failure to Remand

Respondent further asserts that the Department has not been prejudiced by the failure of the ALC to order a remand. He asserts that "because a reasonable person could not conclude that [Respondent] was discharged for cause based upon this record, a remand would result in the same outcome." (Resp Br'f p. 15.). Drake, supra, succinctly outlines the Supreme Court's view regarding the necessity of remand in the instant case. The Supreme Court held:

> [Remand is required] where the [administrative agency] has failed to make essential findings of fact, or the findings made are so indefinite or general as to afford no reasonable basis upon which the appellate court can determine whether the findings of fact are supported by the evidence and whether the law has been properly applied to those findings. ***To hold otherwise would in such cases make the determination of the rights of the parties turn upon the neglect of the {agency} to make essential findings of fact, or require the appellate court to make the omitted findings of fact which our statute forbids.***

Id., 241 S.C. 116, at 127 S.E.2d at 292-93 (1962)(emphasis added). Appellant is inherently prejudiced by the ALC's failure to remand the case. Therefore, Respondents assertion should be rejected.

Substantial evidence has been said not to be "the evidence viewed blindly from one side of the case." Lark v. Bi-Lo, Inc., 276 S.C. at 135, 276 S.E.2d at 306. The logical inverse prohibits the ALC from ignoring all relevant evidence which would support the existence of a material dispute in the facts simply to impose its on judgment on the case. The Supreme Court espoused a judicial policy in Gray v. Laurens Mill, 231 S.C. 488, 99 S.E.2d 36 (1957) that a remand is required under these circumstances to call for the "attention of the [Panel to be] fastened upon the questions" at hand. Id. 231 S.C. at 492-93, 99 S.E.2d at 38. Furthermore, it is not "good practice" to excuse the Panel from explicitly stating the existence of conditions which justify its actions or at least a statement of the theory on which the denial was based.

CONCLUSION

The decision of the ALC is not supported by substantial evidence on the record as a whole and is not in compliance with the standard of review mandated by the APA and relevant authority; therefore, the decision should be reversed and remanded to the Panel for more explicit and definite findings of fact.

Respectfully submitted,

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July 31, 2013

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ATTORNEY'S CERTIFICATION THAT FINAL REPLY BRIEF COMPLIES WITH RULE 211(B).

Respondent certifies, through its undersigned attorney, that Appellant's Final Reply Brief complies with Rule 211(b).

July 31, 2013

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